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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 448

PEGGY SHADE, Full Blood Cherokee Indian, Roll No. 14147,

Appellant,

VERSUS

LUCY DOWNING, now FOSTER, NANCY DOWNING, now TAYLOR, and POLLY DOWNING, now WILLIAMS,

Appellees.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF OF APPELLANT

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JANUARY, 1948.

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STATEMENT OF CASE

CERTIFICATE

The Certificate of the Circuit Court is the entire record so that we deem any effort to more completely state the same as unnecessary. The same is copied herein *verbatim.*

"STATEMENT OF FACTS

"A tract of land situated in Rogers County, Oklahoma, was allotted to Thompson Downing, a full-blood Cherokee (fol. 2) Indian enrolled opposite Roll No. 14644. Thompson Downing died intestate in Cherokee County, Oklahoma, on March 17, 1934. Thompson Downing and Sallie Downing lived together as husband and wife until some time after 1908, when Thompson Downing left Sallie Downing. To the marriage between Thompson and Sallie Downing three daughters were born, Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams. On February 21, 1916, a marriage license was issued to Thompson Downing and Polly Manus. On February 22, 1916, a marriage ceremony was performed between Thompson Downing and Polly Manus. They, thereafter, lived together as husband and wife. No children were born, the issue of that marriage. Sallie Downing died November 3, 1920, and Thompson Downing and Polly Manus continued thereafter to live together as husband and wife until the death of Thompson Downing. Polly Manus died intestate, without issue, April 20, 1934, leaving Peggy Shade, a sister, as her only heir.

"Lucy, Nancy and Polly Downing, now Williams, filed a (fol. 3) petition in the county court of Cherokee County, Oklahoma, to determine the heirs of Thompson Downing, under the Act of June 19, 1918, 40 Stat. 606. Thereafter, on January 4, 1935, a decree was entered in such proceeding by which it was adjudged that the three petitioners were the sole and only heirs of Thompson Downing, deceased, and that each inherited an undivided one-third interest in the property of which Thompson Downing died seized. No notice of the pendency of the proceeding to determine the heirs of Thompson Downing, deceased, was served upon the Superintendent for the Five Civilized Tribes, pursuant to Sec. 3 of the Act of April 12, 1926, 44 Stat. 239, 240.

"Peggy Shade brought this action against Lucy, Nancy, and Polly Downing, now Williams, in the District Court of Cherokee County to recover possession of an undivided one-fourth interest in such allotted lands, to quiet the title to such interest, and for an accounting of the rents and profits therefrom. In her complaint, she alleged the facts (fol. 4) above stated; that Polly Manus, as the surviving wife of Thompson Downing, deceased, inherited one-fourth of the property of which Thompson Downing died seized, and that she inherited such interest as the sole heir of Polly Manus, deceased. She challenged the validity of the decree of heirship on the grounds: That Polly Manus was not named in the petition for determination of heirship and was not served with notice of the proceeding to determine heirship; that notice of the pendency of such proceeding was not served upon the Superintendent for the Five Civilized Tribes; and that extrinsic fraud was practiced by the defendants below upon Peggy Shade. Notice of the pendency of this action was served upon the Superintendent for the Five Civilized Tribes in the manner prescribed by Sec. 3 of the Act of April 12, 1926. Thereupon, the cause was duly removed to the United States District Court for the Eastern District of Oklahoma. From a judgment in favor of the defendants below, Peggy Shade has appealed. The United States did not join in such appeal.

"(fol. 5) QUESTION CERTIFIED

"(1) Is the United States a necessary party to a proceeding to determine the heirship of a deceased citizen allottee of the Five Civilized Tribes brought under the Act of June 19, 1918, 40 Stat. 606?

"Orie L. Phillips, Sam G. Bratton, Walter A. Huxman, Judges of the United States Circuit Court of Appeals, Sitting in Said Cause."

The record of the Circuit Court shows the proceedings of the trial court and we feel that the entries made by that

court, including the Findings of Fact and Conclusions of Law and the Judgment, should be read in connection with the Certificate of the Circuit Court, and the same are as follows:

"FINDINGS OF FACT AND CONCLUSIONS OF LAW

"Now on this 6th day of June, 1945, pursuant to assignment this cause comes on for trial in the above court sitting at Muskogee, Oklahoma; the plaintiff, Peggy Shade, appears in person and by her counsel of record, C. F. Bliss and Kelly Brown; the defendants, Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams, appear in person and by their counsel of record, Henry L. Burris and Forrester Brewster; the United States of America appears by Francis Stewart, assistant United States Attorney.

"Findings as to Jurisdiction

"From an examination of the proceedings herein, the court finds:

"This cause was filed in the District Court of Cherokee County, Oklahoma, to obtain possession of an undivided interest in the allotted lands of Thompson Downing, full blood Cherokee Indian, enrolled opposite No. 14644, and to quiet title thereto and recover rents and profits arising therefrom.

"And after notice duly given to the Superintendent for the Five Civilized Tribes in the manner prescribed by Section 3 of the Act of Congress of April 12, 1926, and pursuant to the provisions thereof, and within the time allowed thereunder or extended by permissive order of court, this cause was removed by the United States to this court; thereafter the United States moved for additional time to plead, but on this date permission is granted the United States to withdraw its motion, and the United States elects not to file any additional pleading.

"All of said proceedings have been regular and the action involves claims of full blood Indian heirs to restricted lands of which this court has jurisdiction to hear and determine under the provisions of said Act of April 12, 1926.

"All parties not appearing have been regularly served or action against them dismissed, and none of the parties are in the armed forces of the United States.

"The court finds that it has jurisdiction of said action and of the parties, and after having ordered that the cause proceed to trial and judgment, the court hears the evidence, and considers the motion of defendants for judgment and enters the following findings of fact and conclusions of law:

"Findings of Fact

"1. The real estate involved in this action was allotted to Thompson Downing, full blood Cherokee Indian, enrolled opposite Roll No. 14644.

"2. The funds received by the Superintendent for the Five Civilized Tribes represent profits from oil and gas produced from the said allotted lands of Thompson Downing.

"3. Thompson Downing died intestate, a resident of and domiciled in Cherokee County, Oklahoma, on the 17th day of March, 1934.

"4. Thompson Downing and Sallie Downing lived together as husband and wife until sometime after Statehood, when Thompson Downing left the said Sallie Downing.

"5. To the marriage between Thompson and Sallie Downing were born three children, Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams, defendants herein.

"6. A marriage license was issued to Thompson Downing and Polly Manus, February 21, 1916, and a marriage ceremony was performed between them

February 22, 1916. They lived together thereafter as husband and wife. No children were born to them.

"7. Sallie Downing died November 3, 1920, and Thompson Downing and Polly Manus continued to live together thereafter as husband and wife until the death of Thompson Downing. Polly Downing, or Polly Manus, survived Thompson Downing.

"8. Polly Manus, or Polly Downing, died intestate, unmarried and without issue, about April 20, 1934, and Peggy Shade, plaintiff in this cause, is admittedly her sole and only heir.

"9. In proceedings in the County Court of Cherokee County, Oklahoma, in the Matter of the Estate of Thompson Downing, deceased, Probate Case No. 3411, a decree was entered January 4, 1935, determining the defendants, Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams, children of Thompson Downing, deceased, to be his only heirs, each of them to inherit one-third of his property.

"10. No notice was served upon the Superintendent for the Five Civilized Tribes under the Act of April 12, 1926, in the probate proceedings for the determination of the heirs of Thompson Downing, deceased.

"11. Notice of the hearing for the determination of the heirs of Thompson Downing, deceased, was duly given and Peggy Shade filed in said proceedings an instrument entering her appearance and purportedly disclaiming any interest in the estate of Thompson Downing, deceased, and the regularity of said heirship proceedings is not challenged.

"12. The judgment and decree determining heirs in Probate Cause No. 3411, in the Matter of the Estate of Thompson Downing, deceased, rendered January 4, 1935, has not been set aside and no appeal is pending therefrom.

"Conclusions of Law

"From the foregoing facts the court concludes the applicable law to be as follows:

"1. Under the provisions of said decree and judgment of heirship, Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams, became the owners in equal shares of all of the real estate and profits arising therefrom belonging to Thompson Downing, deceased, and involved in this action.

"2. The evidence is insufficient to establish fraud in the rendition of the decree determining heirs entered by the County Court of Cherokee County on January 4, 1935.

"3. The United States was not a necessary party to said heirship proceedings, and notice under the Act of April 12, 1926, upon the Superintendent for the Five Civilized Tribes was not necessary to the validity of said decree of January 4, 1935.

"4. The judgment and decree of the probate court in Cause No. 3411 determining the heirs of Thompson Downing is final and conclusive.

"5. Polly Downing was the lawful surviving wife of Thompson Downing, and Peggy Shade as her sole heir, would have inherited a one-fourth interest in his estate, and would now own said one-fourth, except for the bar of the decree of heirship of the County Court of Cherokee County.

"6. The plaintiff's evidence is insufficient to prove a claim against the defendants upon which relief can be granted.

"Judgment on defendants' motion will be entered herein against the plaintiff and in favor of the defendants in accordance with these findings. Counsel for defendants will prepare and submit form for judgment."

Judgment was rendered thereupon as follows:

"JUDGMENT

"This cause comes on for trial June 6, 1945, at Muskogee, Oklahoma, pursuant to the regular assignment. Plaintiff appears in person and by her counsel, C. F. Bliss and Kelly Brown: the defendants, Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams, appear in person and by their counsel, Henry L. Burris and Forrester Brewster; and the United States of America appears by Francis Stewart, assistant United States Attorney. Permission is granted the United States to withdraw its motion for time to plead, and to file no pleading. The court thereupon after consideration of the proceedings, adjudges that it has jurisdiction to proceed, and orders said cause to proceed to judgment. The evidence is heard and at the close of the evidence offered by the plaintiff defendants move for judgment because the evidence is insufficient to prove a claim against the defendants upon which relief may be granted. After hearing the argument of counsel, being fully advised in the premises the court finds the issues in favor of the defendants and against the plaintiff as shown in the findings of fact and conclusions of law, entered herein, which by reference are made a part of this judgment. In accordance with said findings of fact and conclusions of law,

"It is therefore ordered, adjudged and decreed that this court has jurisdiction of all parties and the subject matter involved in this action.

"It is further ordered, adjudged and decreed that the plaintiff, Peggy Shade, take nothing and that her petition be dismissed.

"It is further ordered, adjudged and decreed by the court that the defendants, Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams, have and recover from the plaintiff the costs of this action."

STATEMENT OF POINTS RELIED UPON BY APPELLANT

1. That no service was had on the United States of America, by serving the United States Indian Superintendent as directed by the Act of Congress of April 12, 1926, and the Act of Congress of 1933.

2. Said decree is in no way a transfer of real estate or interest therein of a full blood Indian heir and consequently could not and does not transfer the interest in said real estate inherited by the said Polly Downing upon the death of Thompson Downing, and by this appellant upon the death of the said Polly Downing.

3. Fraud practiced by the appellees herein on the County Court, Cherokee County, Oklahoma, by failure to allege and show to said court that Polly Downing was the surviving wife of Thompson Downing, and further, by procuring by misrepresentation the signature of Peggy Shade to waiver filed in Cause No. 3411 in the County Court of Cherokee County, Oklahoma, in the proceeding for determination of the heirs of Thompson Downing.

ARGUMENT AND AUTHORITIES

The statutes for consideration and construction in this case are the Acts of Congress. The Act of May 27, 1908, the Allotment Act, the Act of June 14, 1918, providing for determination of heirship, and the Act of April 12, 1926, providing the manner of service in making the United States a party to actions involving restricted Indians. These Acts are made a part of our argument herein by

Exhibits A, B and C hereto. It will be necessary to quote from such exhibits to a limited extent.

The Allotment Act, Exhibit A, so far as pertinent to this case, contains the following provisions:

"Section 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.

"Nothing in this Act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this Act.

"Section 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.

"Section 11. That all royalties arising on and after July First, Nineteen Hundred and Eight, from

mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian Agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong."

The Act for determination of heirship, Exhibit B, vests the jurisdiction for the naming of the heirs in the county court and in the concluding section provides that notwithstanding the proceedings taken the lands shall remain subject to all restrictions upon alienation or taxation obtaining prior to such partition.

The Act of 1926, which provides a procedure for making the United States a party, contains among other matters, the following:

"Section 9. The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land; Provided, that hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator.

"Section 3. Any one or more of the parties to a suit in the United States court in the State of Oklahoma or in the State court of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent

for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved."

From a consideration of the foregoing statutes the protective interest of our Government is made certain, and for the welfare of the restricted Indians it is necessary. It appears certain that a conveyance of title is not sanctioned unless these provisions of our law are carefully observed.

In this case, if the judgment of the trial court becomes final, a conveyance of the interest of this appellant was achieved without compliance with these laws. The record itself makes this certain and to sustain this statement we quote from the Findings of Fact, Finding No. 10 as follows:

"10. No notice was served upon the Superintendent for the Five Civilized Tribes under the Act of April 12, 1926, in the probate proceedings for the determination of the heirs of Thompson Downing, deceased."

And from the Conclusions of Law:

"3. The United States was not a necessary party to said heirship proceedings, and notice under the Act of April 12, 1926, upon the Superintendent for the Five Civilized Tribes was not necessary to the validity of said decree of January 4, 1935.

"4. The judgment and decree of the probate court in Cause No. 3411 determining the heirs of Thompson Downing is final and conclusive.

"5. Polly Downing was the lawful surviving wife of Thompson Downing, and Peggy Shade as her sole heir, would have inherited a one-fourth interest in his estate, and would now own said one-fourth, except for the bar of the decree of heirship of the County Court of Cherokee County."

A devious route was pursued, but by the judgment of the trial court the title was conveyed.

The heirship statute, the Act of June 14, 1918, and the procedural statute, the Act of April 12, 1926, have been given consideration by this Court in the rather recent case of *United States* v. *Hellard*, 322 U.S. 363, as to a partition suit. The construction of the two Acts together have been considered also with reference to the determination of heirship.

United States v. *Hellard*, *supra*:

"Full-blood Indians of the Five Civilized Tribes may not be divested of title to restricted land by a sale pursuant to a judgment of a State court in a partition proceeding to which the United States was not a party. Construing Act of June 14, 1918; Act of April 12, 1926, Page 368."

And on Pages 364 to 368, we wish to quote the following:

"The heirs instituted partition proceedings in the District Court of Creek County, Oklahoma, in March, 1940. The United States was not named as a party nor was notice of the suit served on the Superintendent. A judgment of partition was entered pursuant to which the land was sold and a sheriff's deed in

partition issued to respondent. In 1941 respondent instituted in the same court the present action against the Indian heirs to quiet his title. Notice was served on the Superintendent. The heirs answered disclaiming any interest. At the instance of the United States the cause was removed to the Federal District Court as authorized by Section 3 of the Act of April 12, 1926. The United States then answered, alleging that the partition proceedings were void for lack of the United States as a party and for want of service on the Superintendent under Section 3 of the Act of April 12, 1926. It prayed that the deed in partition be set aside and title quieted in the heirs. The district court held that the partition proceedings were valid and quieted title in respondent. The Circuit Court of Appeals affirmed, 138 Fed. (2d) 985. The case is here on a petition for a writ of *certiorari* which we granted because of the importance in the administration of Indian affairs of the question presented.

"It seems clear from the language of the Act of June 14, 1918, and its legislative history (S. Rep. No. 330, 65th Cong., 2 Sess.), that Congress vested in the Oklahoma State courts jurisdiction to determine heirship in these restricted lands (Section 1) and jurisdiction to partition them (Section 2). See *Salmon* v. *Johnson*, 78 Okla. 182, 189 Pac. 537; *United States* v. *Bond*, 108 Fed. (2d) 504. The authority of Congress to select State tribunals to perform such functions is clear. *Parker* v. *Richard*, 250 U.S. 235; *Harris* v. *Bell*, 254 U.S. 103; *Stewart* v. *Keyes*, 295 U.S. 403. But a grant of jurisdiction to a particular court without more does not determine what parties are indispensable to the proceedings in question. Petitioner concedes that the United States is not a necessary party to proceedings to determine heirship under Section 1 of the Act of June 14, 1918. Since restrictions on alienation do not prevent inheritance, no governmental interest is at least directly involved in such a determination. It may likewise be inferred from the language, nature and purpose of Acts of Congress which vest jurisdiction over specified Indian affairs in a desig-

nated court that Congress not only has made the tribunal the exclusive agency to effectuate the Federal policy but also has dispensed with any requirement that the United States be a party to the proceedings. See *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U.S. 401, 413-414; *Winston* v. *Amos*, 255 U.S. 373, 392. But we do not think that Congress did more by those provisions of the Act of June 14, 1918, with which we are presently concerned than to grant the Oklahoma State courts jurisdiction over partition proceedings.

"Restricted Indian land is property in which the United States has an interest. 'This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust.' *Heckman* v. *United States*, 224 U.S. 413, 437. Though the Indian's interest is alienated by judicial decree, the United States may sue to cancel the judgment and set the conveyance aside where it was not a party to the action. *Bowling & Miami Investment Co.* v. *United States*, 233 U.S. 528; *Privett* v. *United States*, 256 U.S. 201; *Sunderland* v. *United States*, 266 U.S. 226. Under Section 2 of the Act of June 14, 1918, lands partitioned in kind to full-bloods remain restricted. Only if the land is sold at partition sale are the restrictions removed. The governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States. *Minnesota* v. *United States*, 305 U.S. 382, 387-388; *Town of Okemah* v. *United States*, 140 Fed. (2d) 963. The United States as guardian of the Indians is necessarily interested either in obtaining partition in kind where that course conforms to its policy of preserving restricted land for the Indians or in seeing that the best possible price is obtained where a sale is desirable. Where, as here, the lands are both tax-exempt and restricted, the United States is concerned with the reinvestment of the proceeds in other lands likewise tax-exempt and restricted as provided in the Act of June 30, 1932, 47 Stat. 474, 25 U.S.C., Sec. 409a. The United States is also inter-

ested in protecting the preferential right of the Secretary of the Interior to purchase the land at the sale for another Indian, as provided in Section 2 of the Act of June 26, 1936, 49 Stat. 1967. These are important governmental interests. Since the power of Congress over Indian affairs is plenary, it may waive or withdraw these duties of guardianship or entrust them to such agency—State or Federal—as it chooses. But we do not find any indication that when Congress came to deal with these partition proceedings it substituted the Oklahoma State court for the Secretary of the Interior in the performance of the functions which we have enumerated. That alone would not be fatal to respondent's position if it could be inferred that those governmental interests were to be protected by means other than making the United States a party. But, as we have said, the Act in question purports to be no more than a jurisdictional statute. It fails to say that the United States is not a necessary party; nor does it suggest that the United States or its officers are confined to a limited role in the proceedings. Cf. *United States* v. *Candelaria*, 271 U.S. 432, 444. We must read the Act in light of the history of restricted lands. That history shows that the United States has long been considered a necessary party to such proceedings in view of the large governmental interests which are at stake. We will not infer from a mere grant of jurisdiction to a State or Federal court to adjudicate claims to restricted lands and to order their sale or other distribution that Congress dispensed with that long-standing requirement. The purpose to effectuate such a major change in policy must be clear."

Anderson v. *Peck et al.*, 53 Fed. (2d) 257, Syllabus 4 is as follows:

"In proceeding to determine heirs of restricted member of Five Civilized Tribes, adjudication held not binding on United States in absence of service of notice upon Superintendent for Tribes (Comp. Stat. Okla.

1921, Section 1384; Act of April 12, 1926, Section 3, 44 Stat. 239)."

And on Pages 259 and 260, we consider the pertinent part of the opinion as follows:

"(4) The record shows that written notice of the pendency of the heirship proceedings were not served upon the Superintendent for the Five Civilized Tribes, and therefore, since the proceedings involved restricted heirs of a restricted member of the Five Civilized Tribes, that the United States was not bound by the proceedings had in the county court. Act of Congress, April 12, 1926, 44 Stat., Part 2, Page 239, Section 3. As the United States was not bound, it is free to proceed with this cause as no binding order or decree has been entered in Okmulgee County insofar as it is concerned. This court has jurisdiction to determine the matters presented by the bill in intervention of the United States, the allegations of which are similar to those of complainant's bill. This court likewise has jurisdiction to determine this cause upon the bill of complaint filed by Hanna Anderson, because of the diversity of citizenship of the parties hereto, as well as the subject-matter of the action.

"(5) I am of the opinion that the judgment and decree of the county court of Okmulgee County purporting to determine the heirship of the deceased allottee is not binding upon complainant, for want of notice, as required by the statutes of Oklahoma, as well as because of the manner in which the said Hanna Anderson was denied the right to participate in those proceedings. Hanna Anderson was denied the right to appear in her own person and present her claim as the only heir of the deceased allottee. It is plain from an examination of the heirship proceedings in Okmulgee County that the court imposed upon Hanna Anderson the restriction that she could only be heard in said proceedings through her guardian, whose appointment had been superseded and the order of appointment, as disclosed by the proceedings, to be a nullity. See *United*

States v. *Throckmorton*, 98 U.S. 61, 25 L. ed. 93; *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. ed. 914.

"(6-8) Even if the proceedings for the determination of heirship had been regularly conducted, and the statutory notice had been served upon Hanna Anderson as a known heir, still this court would have jurisdiction of this cause, because it is an action to quiet title to land, which is the subject of equity jurisdiction. See *Harrison* v. *Moncravie* (C.C.A.), 264 Fed. 776; *Arrowsmith* v. *Gleason*, 129 U.S. 86, 9 S. Ct. 237, 32 L. ed. 630; *Twist et al.* v. *Prairie Oil & Gas Co.*, 274 U.S. 684, 47 S. Ct. 755, 71 L. ed. 1297. A proceeding to determine heirship under the statutes above cited does not try and determine title; it merely establishes the fact as to the heirship. *Homer* v. *Lester*, 95 Okla. 284, 219 Pac. 392; *In re: Jackson's Estate*, 117 Okla. 151, 245 Pac. 874. The Federal District Courts have jurisdiction to ascertain who are the restricted heirs of restricted full-blood Indians, and the Act of Congress of June 14, 1918, *supra*, did not repeal or terminate that jurisdiction. The above Act of Congress vested concurrent jurisdiction in the probate courts of Oklahoma with the jurisdiction vested in the Federal District Courts for such determination. *McDougal* v. *Black Panther Oil & Gas Co.* (C.C.A.), 273 Fed. 113. The power to quiet title vested in the Federal District Court has not been terminated by the above Act of Congress, and a determination of heirship by a county court, if regular and valid, cannot deprive a district court of jurisdiction to determine such questions. If the determination of the question of title involves as an incident to such determination the question of heirship, that fact may be ascertained by the district court, unless the question has been properly adjudicated by some other tribunal vested with such power, as an adjudication binding upon all of the parties to the quieting of title action.

"The contention that the United States was bound by the heirship proceedings by reason of the presence of the United States probate attorney is untenable.

The record shows that neither Mr. Drake nor Mr. Deichman were authorized to appear in the heirship proceedings by the United States. The notice required by the Act of Congress approved April 12, 1926, 44 Stat., Part 2, Page 239, Section 3, was not served upon the Superintendent for the Five Civilized Tribes, and there was no attempt to make the United States a party to the proceedings. Hanna Anderson appeared and testified in the trial of this cause. She is above the average member of her tribe in intelligence, and it is quite clear from the evidence introduced that it is only the substantial value of her estate that has developed considerable controversy among various attorneys as to who should represent her or her guardian. The only protection she needs is the restrictions upon her property imposed by Congress. Such protection as she needs may be adequately enforced through the proper administration of the Acts of Congress applicable to her estate by the Superintendent for the Five Civilized Tribes."

In the case of *United States* v. *Anglin & Stevenson et al.*, 145 Fed. (2d) 622, the fifth Syllabus is as follows:

"On removal of suits involving restricted lands of members of the Five Civilized Tribes, the Federal court is vested with full jurisdiction as if the suits had been originally filed in such court. Act of April 12, 1926. Section 3, 44 Stat. 240."

Referring to the trial court's Conclusions of Law, No. 5 is as follows (R. 29-30):

"Polly Downing was the lawful surviving wife of Thompson Downing, and Peggy Shade as her sole heir would have inherited a one-fourth interest in his estate, and would now own said one-fourth, except for the bar of the decree of heirship of the County Court of Cherokee County."

This disposes of all questions concerning the title of this property as to the interest of this appellant, had it

not been for the decree of heirship entered in the estate of Thompson Downing, deceased (R. 14). And with this decree of heirship and this finding of the court as to the rights of this appellant but for the decree of heirship, we are forced to the conclusion that the decree of heirship was a conveyance of the title of Polly Manus Downing, including the inherited interest of this appellant.

In the quotation from the case of *United States* v. *Hellard, supra,* on Page 367 is this statement:

> "Though the Indian's interest is alienated by judicial decree, the United States may sue to cancel the judgment and set the conveyance aside where it was not a party to the action."

Therefore, the effect of the decree was a conveyance of the title of this appellant. The necessary proceedings for this conveyance to be made a valid conveyance of title were not complied with.

The one fact that is emphasized throughout the above quoted Acts of Congress, and the above opinions, is that the interest of the restricted Indian must be protected. For this protection, and for the various reasons as given in the *Hellard case* as well as the case of *Anderson* v. *Peck, supra,* certain steps were required, one of which was that the United States should be made a party.

The findings of the court, on which we predicate error, show that the notice was not served upon the Superintendent for the Five Civilized Tribes under the Act of April 12, 1926, and further find that this was not neces-

sary. In the light of the statutes quoted and in the light of the decisions, we cannot agree with this finding.

On this point the *Hellard case* is definitely against the validity of such proceeding, and from Page 368, we quote again:

> "We must read the Act in light of the history of restricted lands. That history shows that the United States has long been considered a necessary party to such proceedings in view of the large governmental interests which are at stake. We will not infer from a mere grant of jurisdiction to a State or Federal court to adjudicate claims to restricted lands and to order their sale or other distribution that Congress dispensed with that long-standing requirement. The purpose to effectuate such a major change in policy must be clear."

In the case of *Anderson* v. *Peck, supra*, Page 260:

> "The power to quiet title vested in the Federal District Courts has not been terminated by the above Act of Congress, and a determination of heirship by a county court, if regular and valid, cannot deprive a district court of jurisdiction to determine such question of heirship, that fact may be ascertained by the district court, unless the question has been properly adjudicated by some other tribunal vested with such power, as an adjudication binding upon all of the parties to the quieting of title action."

And referring back to Page 259 of the same opinion, we quote:

> "The record shows that written notice of the pendency of the heirship proceedings was not served upon the Superintendent for the Five Civilized Tribes, and therefore, since the proceedings involved restricted heirs of a restricted member of the Five Civilized Tribes, that the United States was not bound by the proceedings had in the county court."

With the definite finding of the court that Polly Manus Downing was the lawful wife of Thompson Downing, and the further finding that but for the decree of heirship, she and her successor in title, this appellant, would have taken a one-fourth interest in this estate, and the further finding that the notice was not served upon the Superintendent as required by the Act of April 12, 1926, we feel assured that the judgment of the court based upon such proceedings was erroneous and should be vacated and a judgment directed finding that this appellant is entitled to a one-fourth interest in said estate.

Also, in *United States of America* v. *Jose Candelaria*, 271 U.S. 432, this question of the protection given by the Government to restricted Indians was considered with reference to a Pueblo Indian. The matter was before the Circuit Court for the Tenth Circuit and brought to this Court by Certificate the same as the instant case, and the questions in that case were:

> "1. Are Pueblo Indians in New Mexico in such status of tutelage as to their lands in that State that the United States, as such guardian, is not barred either by a judgment in a suit involving title to such lands begun in the territorial court and passing to judgment after statehood or by a judgment in a similar action in the United States District Court for the District of New Mexico, where, in each of said actions, the United States was not a party nor was the attorney representing such Indians therein authorized so to do by the United States?
>
> "2. Did the State Court of New Mexico have jurisdiction to enter a judgment which would be *res judicata* as to (439) Pueblo Indians and opposed

claimants concerning title to land, where the result of that judgment would be to disregard a survey made by the United States of a Spanish or Mexican grant pursuant to an Act of Congress confirming such grant to said Pueblo Indians?"

The answer of the Court to this first question was that the United States is not barred and quoting from the opinion:

"To the first question we answer that the United States is not barred. Our reasons will be stated. The Indians of the Pueblo are wards of the United States and hold their lands subject to the restriction that the same cannot be alienated in any wise without its consent. A judgment or decree which operates directly or indirectly to transfer the lands from the Indians, where the United States has not authorized or appeared in the suit, infringes that restriction. The United States has an interest (444) in maintaining and enforcing the restriction which cannot be affected by such a judgment or decree. This Court has said, in dealing with a like situation: 'It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the Government is a stranger, can affect its interest. The authority of the United States to enforce the restraint lawfully created cannot be impaired by any action without its consent.' *Bowling* v. *United States*, 233 U.S. 528, 534, 58 L. ed. 1080, 34 S. Ct. Rep. 659. And that ruling has been recognized and given effect in other cases. *Privett* v. *United States*, 256 U.S. 201, 204, 65 L. ed. 889, 890, 41 S. Ct. Rep. 455; *Sunderland* v. *United States*, 266 U.S. 226, 232, 69 L. ed. 259, 260, 45 S. Ct. Rep. 64.

"But, as it appears that for many years the United States has employed and paid a special attorney to

represent the Pueblo Indians and look after their interests, our answer is made with the qualification that, if the decree was rendered in a suit begun and prosecuted by the special attorney so employed and paid, we think the United States is as effectually concluded as if it were a party to the suit. *Souffront* v. *La Compagnie Des Sucreries*, 217 U.S. 475, 486, 54 L. ed. 846, 851; 30 S. Ct. Rep. 608; *Lovejoy* v. *Murray*, 3 Wall. 1, 18, 18 L. ed. 129, 134; *Claflin* v. *Fletcher*, 18 Biss. 281, 7 Fed. 851, 852; *Maloy* v. *Duden*, 30 C.C.A. 137, 57 U.S. App. 161, 86 Fed. 402, 404; *James* v. *Germania Iron Co.*, 46 C.C.A. 476, 107 Fed. 597, 613."

The County Court of Cherokee County, Oklahoma, is not vested with authority to try title. Section 12, Article 8, Constitution of Oklahoma, first paragraph thereof is as follows:

"Section 12. GENERAL JURISDICTION OF COUNTY COURTS—ISSUANCE OF WRITS—JUDGES PRO TEMPORE.—The county court, co-extensive with the county, shall have original jurisdiction in all probate matters, and until otherwise provided by law, shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding one thousand dollars, exclusive of interest: Provided, that the county court shall not have jurisdiction in any action for malicious prosecution, or in any action for divorce or alimony, or in any action against officers for misconduct in office, or in actions for slander or libel, or *in actions for the specific performance of contracts for the sale of real estate, or in any matter wherein the title or boundaries of land may be in dispute or called in question; nor to order or decree the partition or sale of real estate, not arising under its probate jurisdiction.*"

In *Fibikowski* v. *Fibikowski*, (Okla.), 94 Pac. (2d) 921, Syllabus 11:

"A county court, in the exercise of its probate jurisdiction, cannot determine question of title to realty. Okla. St. Ann. Const., Art. 7, Section 12."

In the case of *Homer* v. *Lester*, 95 Okla. 284, usually cited in every brief as authority for the determination of heirship under the Act of June 14, 1918, we find one matter that is of interest to this case. As heretofore stated the Act does not give jurisdiction to the county court to name the heirs, but as heretofore stated it does not determine who shall be parties to this proceeding and it is our contention that the Act of 1926 supplements that and, therefore, we contend that it is necessary for the Government to be a party, but in this citation *Homer* v. *Lester*, *supra*, we find this question of the effect of heirship discussed and on Page 289 is the following:

"Who is going to determine that question? No court can determine that question without trying the title to the land. No ingenious reasoning can avoid the plain, obvious conclusion that the answer to the question 'who are the heirs of Thomas J. Taylor?' determines whether these defendants are the owners of the land."

That this question as to the necessity of the Government being a party to such actions has been in doubt, we need no further authority than the case of *United States of America* v. *Judge Eugene Rice*, 327 U.S. 742, No. 411, October Term, 1945. This was a proceeding in the *Peter Micco case* and in the portion of the opinion written by Mr. Justice Douglas, dissenting from the majority of the court, we find this statement which we think is incontroversial:

"The Act of April 10, 1926, 44 Stat. 239, has two main purposes. It provides the machinery for bringing in the United States where the property interests of a restricted Indian of the Five Civilized Tribes are being litigated in either the Federal or the State courts. This was done so that all interested parties might be concluded by one proceeding and titles to these Indian lands stabilized."

The foot note to that statement is as follows:

"Prior to the 1926 Act the United States could not be bound by a proceeding affecting restricted Indian lands. After the matter had been litigated, the United States could still institute an independent suit and annul the prior decree entered in the suit to which it was not a party. *Sunderland* v. *United States*, 266 U.S. 226."

In *Roberts* v. *Anderson*, 66 Fed. (2d) 874, at Page 879, the Circuit Court for the Tenth Circuit having before it for consideration the Act of 1918, stated the following:

"It is argued, with much earnestness, that a conclusive determination of heirship by the county court indirectly operates upon the title to Indian lands; that if such a determination binds the United States when it is not notified of the proceeding, the way is open to circumvent restrictions and the policy of the law announced in the *Candelaria case*. The Act does not clearly refer to heirship proceedings in the probate court; nor are probate proceedings ordinarily removable; an heirship proceeding may indirectly affect the title to lands, or it may not. The point is not necessary to a disposition of the cause, and Congress may clear up any uncertainty that exists before it again arises. We therefore leave it as we find it."

We therefore urge that the question contained in the Certificate from the Circuit Court of Appeals should be answered in the affirmative showing that the United

States should be a party to a proceeding to determine the heirship of a deceased citizen allottee of the Five Civilized Tribes brought under the Act of June 19, 1918.

Respectfully submitted,

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Tahlequah, Oklahoma,

KELLY BROWN,
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Attorneys for Appellant.

JANUARY, 1948.

APPENDIX

EXHIBIT A

PUBLIC LAWS, 60TH CONGRESS,
Volume 35, Part 1, Pages 312-316:

"CHAPTER 199.—*An Act for the Removal of Restrictions from Part of the Lands of Allottees of the Five Civilized Tribes, and for Other Purposes.*

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April Twenty-sixth, Nineteen Hundred and Thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of

alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes Sections Thirteen to Twenty-Three inclusive, of an Act entitled, 'An Act to Grant the Right of Way Through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for Other Purposes,' approved February Twenty-eighth, Nineteen Hundred and Two (Thirty-Second Statutes at Large, Page Forty-Three), are hereby continued in force in the State of Oklahoma.

"Section 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: and provided further, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term 'minors,' as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

"Section 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said Tribes and of no other person to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

"That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior as if this Act had not been passed: Provided, that the owner or owners of any allotted land from which restrictions are removed by this Act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgement of deeds, and the same shall be recorded in the county where the land is situate.

"Section 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: Provided, that allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.

"Section 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before

or after the approval of this Act shall be absolutely null and void.

"Section 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of the State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

"And said representatives of the Secretary of the Interior are further authorized, and it is made their

duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

"Supplemental to the funds appropriated and available for expenses connected with the affairs of the Five Civilized Tribes, there is hereby appropriated, for the salaries and expenses arising under this section, out of any funds in the Treasury not otherwise appropriated, the sum of Ninety Thousand Dollars, to be available immediately, and until July First, Nineteen Hundred and Nine, for expenditure under the direction of the Secretary of the Interior: Provided, that no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise.

"And there is hereby further appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available and available until expended as the Attorney-General may direct, the sum of Fifty Thousand Dollars, to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the Eastern Judicial District of Oklahoma: Provided, that the sum of Ten Thousand Dollars of the above amount, or so much thereof as may be necessary, may be expended in the prosecution of cases in the Western Judicial District of Oklahoma.

"Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dismissed and the title quieted upon payment of the full balance due on the original appraisement of such lot: Provided, that such investigation must be concluded within six months after the passage of this Act.

"Nothing in this Act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this Act.

"Section 7. That no contest shall be instituted after sixty days from the date of the selection of any allotment hereafter made, nor after ninety days from the approval of this Act in case of selections made prior thereto by or for any allottee of the Five Civilized Tribes, and, as early thereafter as practicable, deed or patent shall issue therefor.

"Section 8. That Section Twenty-Three of an Act entitled 'An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes,' approved April Twenty-sixth, Nineteen Hundred and Six, is hereby amended by adding at the end of said section, the words, 'or a judge of a county court of the State of Oklahoma.'

"Section 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided, further, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March Fourth, Nineteen Hundred and Six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in Section One hereof, for the use and support of such issue, during their life or lives, until April Twenty-sixth, Nineteen Hundred and Thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April Twenty-sixth, Nineteen Hundred and Thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, that the provisions of Section Twenty-three of the Act of April Twenty-sixth, Nineteen Hundred and Six, as amended by this Act, are hereby made applicable to all wills executed under this section.

"Section 10. That the Secretary of the Interior is hereby authorized and directed to pay out of any moneys in the Treasury of the United States, belonging to the Choctaw or Chickasaw Nations respectively, any and all outstanding general and school warrants duly signed by the auditor of public accounts of the Choctaw and Chickasaw Nations, and drawn on the national treasuries thereof prior to January First, Nineteen Hundred and Seven, with six per cent interest per annum from the respective dates of said warrants: Provided, that said warrants be presented to the United States Indian Agent at the Union Agency,

Muskogee, Oklahoma, within sixty days from the passage of this Act, together with the affidavits of the respective holders of said warrants that they purchased the same in good faith for a valuable consideration, and had no reason to suspect fraud in the issuance of said warrants: Provided further, that such warrants remaining in the hands of the original payee shall be paid by the Secretary when it is shown that the services for which said warrants were issued were actually performed by said payee.

"Section 11. That all royalties arising on and after July First, Nineteen Hundred and Eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian Agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: Provided, that the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June Thirteenth, Nineteen Hundred and Eight.

"Approved, May 27, 1908."

EXHIBIT B

PUBLIC LAWS, 65TH CONGRESS,
VOLUME 40, PART 1, PAGE 606:

"CHAPTER 101.—*An Act to Provide for a Determination of Heirship in Cases of Deceased Members of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes of Indians in Oklahoma, Conferring Jurisdiction Upon District Courts to Partition Lands Belonging to Full-Blood Heirs of Allottees of the Five Civilized Tribes, and for Other Purposes.*

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled. That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: Provided, That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: Provided further, That where the time limited by the laws of said State for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws: Provided further, That said petition shall be verified, and in all cases arising hereunder service by publication may he had on all unknown heirs, the service to be in accordance with the method of serving non-resident defendants in civil suits in the district courts of said State; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing.

"Section 2. That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions

upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

"Approved, June 14, 1918."

EXHIBIT C

PUBLIC LAWS, 69TH CONGRESS,
Volume 44, Part 2, Pages 239-241:

"CHAPTER 115.—*An Act to Amend Section 9 of the Act of May 27, 1908 (Thirty-Fifth Statutes at Large, Page 312), and for Putting in Force, in Reference to Suits Involving Indian Titles, the Statutes of Limitations of the State of Oklahoma, and Providing for the United States to Join in Certain Actions, and for Making Judgments Binding on All Parties, and for Other Purposes.*

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 9 of the Act of May 27, 1908 (Thirty-Fifth Statutes at Large, Page 312), entitled, 'An Act for the Removal of Restrictions on Part of the Lands of Allottees of the Five Civilized Tribes, and for Other Purposes,' be, and the same is hereby, amended to read as follows:

" 'Section 9. The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That hereafter no conveyance by any fullblood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable unless restric-

tions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided, That the word "issue" as used in this section shall be construed to mean child or children: Provided further, That the provisions of Section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section: And provided further, That all orders of the county court approving such conveyance of such land shall be in open court and shall be conclusive as to the jurisdiction of such court to approve such deed: Provided, That all conveyances by fullblood Indian heirs heretofore approved by the county courts shall be deemed and held to conclusively establish the jurisdiction of such courts to approve the same except where more than one such conveyance of the same interest in the same land has been made by the same Indian to different grantees and approved by county courts of different counties prior to the passage of this Act, and except that this proviso shall not affect and may not be pleaded in any suit brought before the approval of this Act.'

"Section 2. The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any

such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said State: Provided, That no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to expiration of a period of two years from and after the approval of this Act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations.

"Section 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the

notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: Provided, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any suit pending in a State court to the United States District Court by filing in such suit in the State court a petition for the removal of such suit into the said United States District Court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said District Court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

"'Approved, April 12, 1926.'"

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No. 448

In the

Supreme Court of the United States

OCTOBER TERM 1947

PEGGY SHADE, FULL-BLOOD CHEROKEE INDIAN, ROLL No. 14147

VERSUS

LUCY DOWNING, NOW FOSTER, NANCY DOWNING, NOW TAYLOR, AND POLLY DOWNING NOW WILLIAMS.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

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In the SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 448

PEGGY SHADE, FULL-BLOOD CHEROKEE INDIAN, ROLL No. 14147

vs.

LUCY DOWNING, NOW FOSTER, NANCY DOWNING, NOW TAYLOR, AND POLLY DOWNING NOW WILLIAMS.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

Brief for Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams.

JURISDICTION.

In this case the United States Court of Appeals for the Tenth Circuit, acting under Section 239 of the Judicial Code, 28 USCA Section 346, 8 FCA Title 28, Section 346, has certified a question of law upon which it desires the instruction of this Court for the proper decision of the cause.

QUESTION CERTIFIED.

Is the United States a necessary party to a proceeding to determine the heirship of a deceased citizen allottee of the Five Civilized Tribes brought under the Act of June 19,[1] 1918, 40 Stat. 606? (Cer. 3)

[1]The correct date is June *14*, 1918.

STATUTE INVOLVED.

The Act of June 14, 1918, 40 Stat. 606 (25 USC Sections 355, 375, set forth in the Appendix, *infra*, pp. 9-10.

STATEMENT.

The facts upon which the certified question of law rests are stated in the *Certificate* as follows:

"A tract of land situated in Rogers County, Oklahoma, was allotted to Thompson Downing, a full blood Cherokee (fol. 2) Indian enrolled opposite Roll No. 14644. Thompson Downing died intestate in Cherokee County, Oklahoma, on March 17, 1934. Thompson Downing and Sallie Downing lived together as husband and wife until sometime after 1908, when Thompson Downing left Sallie Downing. To the marriage between Thompson and Sallie Downing three daughters were born, Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams. On February 21, 1916, a marriage license was issued to Thompson Downing and Polly Manus. On February 22, 1916, a marriage ceremony was performed between Thompson Downing and Polly Manus. They, thereafter, lived together as husband and wife. No children were born, the issue of that marriage. Sallie Downing died November 3, 1920, and Thompson Downing and Polly Manus continued thereafter to live together as husband and wife until the death of Thompson Downing. Polly Manus died intestate, without issue, April 20, 1934, leaving Peggy Shade, a sister, as her only heir.

Lucy, Nancy and Polly Downing, now Williams, filed a (fol. 3) petition in the county court of Cherokee County, Oklahoma, to determine the heirs of Thompson Downing, under the Act of June 19, 1918, 40 Stat. 606. Thereafter, on January 4, 1935, a decree was entered in such proceeding by which it was adjudged that the three petitioners were the sole and only heirs of Thompson Downing, deceased, and that each inherited an un-

divided one-third interest in the property of which Thompson Downing died seized. No notice of the pendency of the proceeding to determine the heirs of Thompson Downing, deceased, was served upon the Superintendent for the Five Civilized Tribes, pursuant to §3 of the Act of April 12, 1926, 44 Stat. 239, 240.

Peggy Shade brought this action against Lucy, Nancy, and Polly Downing, now Williams, in the District Court of Cherokee County to recover possession of an undivided one-fourth interest in such allotted lands, to quiet title to such interest, and for an accounting of the rents and profits therefrom. In her complaint, she alleged the facts (fol. 4) above stated; that Polly Manus, as the surviving wife of Thompson Downing, deceased, inherited one-fourth of the property of which Thompson Downing died seized, and that she inherited such interest as the sole heir of Polly Manus, deceased. She challenged the validity of the decree of heirship on the grounds: that Polly Manus was not named in the petition for determination of heirship and was not served with notice of the proceeding to determine heirship; that notice of the pendency of such proceeding was not served upon the Superintendent for the Five Civilized Tribes; and that extrinsic fraud was practiced by the defendants below upon Peggy Shade. Notice of the pendency of this action was served upon the Superintendent for the Five Civilized Tribes in the manner prescribed by §3 of the Act of April 12, 1926. Thereupon, the cause was duly removed to the United States District Court for the Eastern District of Oklahoma. From a judgment in favor of the defendants below, Peggy Shade has appealed. The United States did not join in such appeal." (Cer. 1-2)

---

[1]The correct date is June *14*, 1918.

ARGUMENT.

The United States is not a necessary party in proceedings to determine heirship of a full-blood Indian of the Five Civilized Tribes.

A. *No governmental interest is involved in a determination of heirs.*

Congress vested in the probate (County) courts of Oklahoma jurisdiction to determine heirship of deceased full-blood Indians. Section 1, Act of June 14, 1918 (appendix, *infra*,, pp. 9-10). Section 2, Act of June 14, 1918 (appendix, *infra*, p. 10), vested jurisdiction in Oklahoma courts to partition restricted lands. In *United States* v. *Hellard*, 322 U. S. 363-369, it was conceded by the United States, petitioner therein, "that the United States is not a necessary party to proceedings to determine heirship under Section 1 of the Act of June 14, 1918." The *Hellard* case invalidated a sale in partition because the United States was not made a party to the partition suit.[1] Contrasting the interpretation of Section 1, providing for determination of heirship, with Section 2, providing for partition, this Court in the *Hellard* case said:

> "Since restrictions on alienation do not prevent inheritance, no governmental interest is at least directly involved in such a determination. It may likewise be inferred from the language, nature, and purpose of Acts of Congress which vest jurisdiction over specified Indian affairs in a designated court that Congress not only has made that tribunal the exclusive agency to ef-

[1]The holding in the *Hellard* case was based upon the interest of the United States in preserving the restricted character of the land involved; in safeguarding the Indians' interest in the land, whether partitioned in kind or sold. The Government's concern was noted to extend further to the reinvestment of the proceeds in other lands, tax exempt and restricted, and to protect the preferential right of the Secretary of the Interior to purchase the land for another Indian.

fectuate the federal policy but also has dispensed with any requirement that the United States be a party to the proceedings."

The above quotations justify the conclusion that the government and this Court have concluded the United States is not a necessary party to heirship proceedings under Section 1 of the 1918 Act. The determination of heirship does not directly affect the restrictions on the land or the land itself, any interest of the government is not therefore involved. In the light of the *Hellard* decision only a negative answer can be given to the question certified.

B. *Congressional intent negatives the necessity of the United States as a party to heirship proceedings.*

The authority of Congress to select state tribunals to act as administrative agencies in furthering congressional policy is clear. *Parker* v. *Richard*, 250 U. S. 235, *United States* v. *Hellard*, *supra*. It was essential that jurisdiction be vested in an agency of the Government to conclusively settle questions of heirship, *State, ex rel. Miller* v. *Huser*, 76 Okl. 130, 184 P. 113[2]. The finding and determination of heirship by County courts of Oklahoma, administrative agencies of the Government, are conclusive. Such decrees are analogous to adjudication of isssues involving the enrollment right of an Indian, *United States* v. *Wildcat*, 244 U. S. 111, and age and quantum of Indian blood of members

[2]It is within the power of Congress to say, in the first instance, what law of descent shall control restricted lands, and it is certainly within congressional power to entrust administrative officers with the finding of facts necessary to effectuate its purposes, and to provide for a determination of heirship as a question of fact, which simply amounts to a declaration of the persons on whom the law casts the succession—it finds a fact and fixes a status. *State, ex rel. Miller* v. *Huser, supra.* Cf. *McDougal, et al.* v. *Black Panther Oil and Gas Company et al.*, 273 F. 113-119; *Pitman* v. *Commissioner of Internal Revenue*, 64 F. (2d) 710 (10th Cir.).

of Indian tribes as authorized by Section 3 of the Act of May 27, 1908 (35 Stat. 312).

Congress designated the County courts to determine heirs as it might have designated the Superintendent for the Five Civilized Tribes. Cf. *Parker* v. *Richard, supra.* The County court is a probate court and was well qualified to act as a federal agency under designation by Congress to determine the heirs of restricted Indians. Theretofore Congress had entrusted to such courts authority to approve conveyances of full-blood Indians under Section 9 of the Act of May 27, 1908 (35 Stat. 312), thus substituting the County court for the Secretary of the Interior, who formerly performed the same function. See Act of April 6, 1906, Section 22 (34 Stat. 137). *Parker* v. *Richard, supra; Harris* v. *Bell,* 254 U. S. 103; *Stewart* v. *Keyes,* 295 U. S. 403.

Procedure is provided by Section 3 of the Act of April 12, 1926, c 115 (44 Stat. 239), to remove a suit pending in a state court to the United States court on petition by the United States within a limited time after service of notice upon the Superintendent for the Five Civilized Tribes. This Act was intended to include a "suit" or "cause" and did not authorize the removal of a probate proceeding. *In re Micco's Estate,* 59 F. Supp. 434[3].

Congress, in recent legislation, has indicated the construction of Section 1 of the Act of June 14, 1918, by this Court in the *Hellard* case, and the interpretation of Section

[3]Following judgment ordering remand of an administration proceeding on the estate of Peter Micco, restricted Indian member of the Five Civilized Tribes in Oklahoma, this Court in *United States* v. *Rice,* 327 U. S. 742-755, declined to decide that the Circuit Court of Appeals for the Tenth Circuit was authorized by mandamus to review the judgment of the district court, *supra,* remanding the administration proceeding to the state court. Proceedings to determine heirship under section 1 of the 1918 Act are "special proceedings." *In re Jessie's Heirs,* 259 F. 694; *In re Morrison's Estate,* 187 Okl. 553, 104 P. (2d) 437.

3 of the Act of April 12, 1926, in the *Micco* case, were expressive of Congressional intent.[4]

C. *In a contest between full-blood Indians the United States has no interest in the result.*

The Certificate shows that "the United States did not join in such appeal" (Cer. 2) to the United States Circuit Court from which the certified question is brought here. All parties to this appeal are full-blood Indians of the Five Civilized Tribes in Oklahoma. The Government has an equal duty to all parties to this action. Recognizing that it could not become an advocate in behalf of either party the Government declined to participate in this suit. The right of the Government to appear in litigation affecting its wards is reserved for its exclusive benefit. Such right cannot be asserted by a private litigant. Peggy Shade in this litigation cannot claim a right of the United States.[5]

---

[4]Public Law 336, 80th Congress, Chapt. 458, 1st Session, approved August 4, 1947, provides in part in Sec. 3(a) as follows: "The State courts of Oklahoma shall have exclusive jurisdiction * * * of all actions to determine heirs arising under Section 1 of the Act of June 14, 1918 (40 Stat. 606)" and (b) "the United States shall not be deemed to be necessary or indispensable party to any action or proceeding of which the State courts of Oklahoma are given exclusive jurisdiction by the provisions of subsection (a) of this section * * *."

[5]In *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401-415, it is said at pages 412-413: "Another objection is made that the United States is a necessary party defendant, and, not being before the court, no binding decree can be entered herein. The contest here is between two Indians, each claiming the same land under an allotment which was made last to the appellant herein. The United States has no interest in the result. Both parties are Indians claiming under the act of 1885. In our opinion, the claim that the United States must be made a party is without foundation."

The certified question should be answered in the negative.

Respectfully submitted,

HENRY L. BURRIS,
FORRESTER BREWSTER,
Muskogee, Oklahoma,
Attorneys for Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams.

APPENDIX.

The Act of June 14, 1918, 40 Stat. 606, 25 USC Sec. 355, 375, is as follows:

An Act to provide for a determination of heirship in cases of deceased members of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes of Indians in Oklahoma, conferring jurisdiction upon district courts to partition lands belonging to full-blood heirs of allottees of the Five Civilized Tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: Provided, That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: Provided further, That where the time limited by the laws of said State for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws: Provided

further, That said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving non-resident defendants in civil suits in the district courts of said State; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing.

Sec. 2. That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

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No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1947

PEGGY SHADE, FULL BLOOD CHEROKEE INDIAN, ROLL NO. 14147

v.

LUCY DOWNING, NOW FOSTER, NANCY DOWNING, NOW TAYLOR, AND POLLY DOWNING, NOW WILLIAMS

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 448

PEGGY SHADE, FULL BLOOD CHEROKEE INDIAN, ROLL NO. 14147

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ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Pursuant to the request of the Court, this memorandum is filed for the purpose of setting forth the Government's position with reference to the above-entitled cause.

I

THE POSITION OCCUPIED BY THE UNITED STATES IN PREVIOUS PROCEEDINGS IN THE INSTANT CASE

Section 3 of the Act of April 12, 1926, 44 Stat. 239, 240–241, provided a procedure whereby the United States could be concluded by the judgment rendered in certain cases involving restricted In-

dians of the Five Civilized Tribes in Oklahoma. This was done by serving upon the Superintendent of the Five Civilized Tribes a notice of pendency of the suit. The instant case was instituted in the Oklahoma District Court by Peggy Shade and notice of pendency of the suit was served pursuant to the 1926 Act. The United States appeared specially and caused the suit to be removed to the United States District Court for the Eastern District of Oklahoma as authorized by the 1926 Act (Certificate, p. 2).

All of the parties to this proceeding are full blood Indians. As guardian of such parties, the United States took an impartial position as to which of them was entitled to the property. It did not, therefore, file a petition in intervention or other pleading after it had caused the case to be removed to the federal court. This procedure is frequently adopted by the United States when restricted Indians are on both sides of the case.[1] Under the 1926 Act the United States is bound by the judgment whether or not it intervenes in the proceeding. See *McKay* v. *Rogers*, 82 F. 2d 795 (C. C. A. 10). Since the United States had not intervened in the proceedings, it was not a party and it was not named as an appellee in the notice of appeal. See Rule 12 of the Circuit Court of

[1] In the instant case, as in other similar situations, the Department of the Interior took the position that it was merely a stakeholder and that the United States should not intervene.

Appeals for the Tenth Circuit. The United States is not, therefore, a party to the present proceedings upon the Certificate of the Circuit Court of Appeals for the Tenth Circuit.

II

THE POSITION OF THE UNITED STATES UPON THE QUESTION CERTIFIED

Under section 1 of the Act of June 14, 1918, c. 101, 40 Stat. 606, the probate courts of the State of Oklahoma were given jurisdiction to determine the factual question of heirship in the case of members of the Five Civilized Tribes. In *United States* v. *Hellard*, 138 F. 2d 985, 988 (C. C. A. 10), reversed, 322 U. S. 363, the Circuit Court of Appeals had stated that it had never been understood that the proceedings to determine heirship under the 1918 Act or other Acts were void unless the United States were joined as a party or given notice. In its brief in this Court, pp. 15–16, the United States agreed with this statement but distinguished between heirship proceedings and the partition proceedings as follows:

> The United States is not a necessary party to proceedings to determine heirship because the only interests directly involved in such proceedings are those of heirs. No governmental interest of the United States is directly involved, inasmuch as the restrictions on alienation do not prevent inheritance. Cf. *Hy-yu-tse-mil-kin* v.

Smith, 194 U. S. 401, 413–414. Moreover, the determination of heirship does not directly affect the restrictions on the land or the land itself.

See also *In re Micco's Estate*, 59 F. Supp. 434, 440.

The Government adheres to the position taken in the *Hellard* case and, for the reasons there stated, believes that it is not an indispensable party to heirship proceedings brought pursuant to the 1918 Act.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948

SUPREME COURT OF THE UNITED STATES

No. 448.—October Term, 1947.

Peggy Shade, Full Blood Cherokee Indian, Roll No. 14147, *v.* Lucy Downing, Now Foster, Nancy Downing, Now Taylor, and Polly Downing, Now Williams.	On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

[April 5, 1948.]

Mr. Justice Douglas delivered the opinion of the Court.

The Circuit Court of Appeals for the Tenth Circuit, acting under Judicial Code § 239, 28 U. S. C. § 346, has certified the following question for our determination:

> "(1) Is the United States a necessary party to a proceeding to determine the heirship of a deceased citizen allottee of the Five Civilized Tribes brought under the Act of June 19, 1918, 40 Stat. 606?"

On January 4, 1935, the County Court of Cherokee County, Oklahoma, decreed that the sole and only heirs of Thompson Downing, a full-blood Cherokee, were his three daughters, the appellees below. Sometime thereafter Peggy Shade brought this suit in an Oklahoma court to claim, as the only heir of Downing's second wife, an undivided one-fourth interest in Downing's allotted lands. She attacked the 1935 decree on the ground, among others, that no notice of the pendency of the heirship proceedings had been served on the Superintendent for the Five Civilized Tribes under the Act of April 12, 1926, 44 Stat.

239, 240–241.[1] Notice of the pendency of the present action was duly served upon the Superintendent and on his motion the cause was removed to the District Court for the Eastern District of Oklahoma. Judgment was entered for defendants on June 6, 1945, the court holding that the United States was not a necessary party to the 1935 heirship proceedings, and that notice under the 1926 Act was not necessary to the validity of that decree. On appeal, the court below certified the above question for our determination.

---

[1] Sec. 3 of the Act, so far as material here, provides: "Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. . . . *Provided*, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. . . ." See *United States* v. *Rice*, 327 U. S. 742, Cf. Pub. L. No. 336, 80th Cong., 1st Sess. (Aug. 4, 1947) § 3 (c); H. R. Rep. No. 740, 80th Cong., 1st Sess., p. 4.

The Act of June 19, 1918, 40 Stat. 606, 25 U. S. C. §§ 375, 355,[2] vested in the Oklahoma courts jurisdiction to determine heirship of restricted Indian lands and to entertain proceedings to partition such lands.[3] See §§ 1 and 2. It is a jurisdictional statute only (see *United States* v. *Hellard*, 322 U. S. 363, 365) and leaves open the question whether the United States is a necessary or indispensable party to proceedings under either section.

We held in *United States* v. *Hellard, supra*, that the United States is a necessary party to partition proceedings brought under § 2 of that Act. That holding was based upon the direct and important interests of the government in the course and outcome of partition proceedings, interests flowing from the statutory restrictions on alienation of allotted lands. Lands partitioned in kind to full-blood Indians remain restricted under § 2. Thus the United States, as guardian of the Indians, is directly interested in obtaining a partition in kind, where that course conforms to its policy of preserving restricted

[2] Sec. 1 provides: "That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question. . . ."

Sec. 2 provides: "That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."

[3] It is well-settled that Congress has authority to select state agencies to perform such functions. *United States* v. *Hellard, supra*, p. 365.

lands for the Indians, or, if a sale is desirable, in insuring that the best possible price is obtained. Moreover, if the lands are both restricted and tax-exempt, it has an interest in the reinvestment of the proceeds of the sale in similarly tax-exempt and restricted lands. Act of June 30, 1932, 47 Stat. 474, 25 U. S. C. § 409a. And there is a further interest in protecting the preferential right of the Secretary of the Interior to purchase the land for another Indian under § 2 of the Act of June 26, 1936, 49 Stat. 1967. For these reasons we held in *United States* v. *Hellard, supra,* that the United States was a necessary party to the partition proceedings, even absent a statutory requirement to that effect.

Heirship proceedings, however, present quite different considerations. They involve no governmental interests of the dignity of those involved in partition proceedings. Restrictions on alienation do not prevent inheritance. *United States* v. *Hellard, supra,* p. 365. Death of the allottee operates to remove the statutory restrictions on alienation; and the determination of heirship does not of itself involve a sale of land.[4] The heirship proceeding involves only "a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes."[5] As such, it is little more

[4] The Act of April 12, 1926, provides in part: "The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land. *Provided,* That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator. . . ." See also Pub. L. No. 336, 80th Cong., 1st Sess. (Aug. 4, 1947) § 1. We do not have before us the question as to whether or not the United States is a necessary party to a proceeding to obtain court approval of a deed under the 1926 Act.

[5] See § 1 of the 1918 Act, note 2, *supra.*

than an identification of those who by law are entitled to the lands in question and does not directly affect the restrictions on the land or the land itself. Important as these proceedings may be to the stability of Indian Land titles,[6] they are of primary interest only to the immediate parties. The United States is, indeed, hardly more than a stakeholder in the litigation.

That is the distinction between partition and heirship proceedings which we recognized in *United States* v. *Hellard*, *supra*, pp. 365–366. We adhere to it.[7] Accordingly the question certified is answered "No."

So ordered.

MR. JUSTICE REED, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON would answer the question in the affirmative because, in their view, the purpose of Congress was to permit the intervention of the United States in cases in which a restricted member of the Five Civilized Tribes is a party and therefore the United States is a necessary party to the proceedings.

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[6] See Sen. Rep. No. 330, 65th Cong., 2d Sess., p. 1.

[7] Subsequent to the institution of these heirship proceedings, and after the decision in the *Hellard* case, Congress marked this distinction by providing that the Oklahoma state courts should have exclusive jurisdiction in all actions to determine heirship under § 1 of the 1918 Act and that the United States is not a necessary or indispensable party to such proceedings. § 3 (a) and (b) of Pub. L. No. 336, 80th Cong., 1st Sess. (Aug. 4, 1947). Moreover, Congress by § 3 of the Act of July 2, 1945, 59 Stat. 313, 314, provided that no order, judgment or decree in partition made subsequent to the 1918 Act and prior to the 1945 Act and involving inherited restricted lands of enrolled and unenrolled members of the Five Civilized Tribes nor any conveyance pursuant thereto should be invalid because the United States was not a party or was not served with any notice or process in connection therewith.